EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: ZIMMER NEXGEN KNEE IMPLANT PRODUCTS LIABILITY LITIGATION,	)	Docket No. 11 C 5468
	)	Chicago, Illinois
	)	April 12, 2012
	)	10:00 a.m.

TRANSCRIPT OF PROCEEDINGS - Motions
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

For the Plaintiffs:

JOHNSON BECKER PLLC
BY: MR. TIMOTHY BECKER
33 South 6th Street, Suite 4530
Minneapolis, Minnesota 55402

ANAPOL SCHWARTZ
MR. JAMES R. RONCA
1710 Spruce Street
Philadelphia, Pennsylvania 19103

FOOTE, MEYERS, MIELKE & FLOWERS, LLC
BY: MR. BRIAN J. PERKINS
3 North Second Street, Suite 300
St. Charles, Illinois 60174

POGUST, BRASLOW, MILLROOD
BY: MR. TOBIAS L. MILLROOD
161 Washington Street
Conshohocken, Pennsylvania 19428

For the Defendants:

FAEGRE BAKER DANIELS, LLP
BY: MR. JOSEPH H. YEAGER, JR.
300 North Meridian Street, Suite 2700
Indianapolis, Indiana 46204

FAEGRE BAKER DANIELS, LLP
BY: MR. KYLE OSTING
MS. ABIGAIL M. BUTLER
111 East Wayne Street, Suite 800
Fort Wayne, Indiana 46802

APPEARANCES (Continued):

FAEGRE BAKER DANIELS, LLP
BY: MR. KURT E. STITCHER
311 South Wacker Drive, Suite 4400
Chicago, Illinois 60606

Also Present: Mr. Robert D. Rowland
(telephonically)

Court Reporter: FRANCES WARD, CSR, RPR, FCRR
Official Court Reporter
219 S. Dearborn Street, Suite 2118
Chicago, Illinois 60604
(312) 435-5561
frances_ward@ilnd.uscourts.gov

protective order on third parties, we pretty clearly heard you say that the objection that Zimmer had, at least as it related to discovery, was overruled.

THE COURT: Well, I did say that. But let me clarify what I understood we were talking about. I thought what we were talking about was third-party discovery.

MR. BECKER: We were.

THE COURT: And it seemed to me that there was a great deal of utility in simply overruling the objection because, otherwise, we were going to tie up third-party discovery for a long period of time. There was no indication, as far as I could tell, that third parties were in any genuine distress about the idea that their production should go beyond the 5950.

Zimmer feels differently about it for reasons that I think probably make sense. And I do think that I am governed in this case by the scope of the MDL order, which I thought limits the MIS tibial aspect of the case to the 5950.

Now, that doesn't necessarily mean that there would be no other production. But I would expect that any other production would -- the material produced about any other components would illuminate issues relating to the 5950 in some way. And there would have to be some kind of articulable description of that -- of why these other materials relate to claims involving the 5950.

I don't know whether that's clear. But I guess what I am saying with respect to this dispute, Paragraph III(c)(4) of the proposed CMO 3, I would likely adopt plaintiffs' proposal and make it "s," components, but I don't think that that should be viewed as a victory for plaintiffs on this issue because I still think it ought to be limited to components that somehow have a direct involvement with the 5950.

Obviously, 5950 documents, and maybe there are other tibial components that have the same design or were constructed at the same time or were created for the same reason and that's why the design documents would have -- would be completely overlapping.

MR. BECKER: Here is what we understand to be true.

THE COURT: All right.

MR. BECKER: And I think I hear what the Court is saying.

At one of the last status conferences -- I don't know if it was the one before, at the semiscience day -- Mr. Yeager showed you a chart of all of the various parts and components and tibial parts and femoral parts and patellar knobs that Zimmer manufactures.

Within those components there is a subset, as we understand it, of MIS tibial components. And then, within that family there is a subset of MIS tibial components that

have different serial numbers. The recall implicated the 5950.

Mr. Ronca has a case involving the --

MR. RONCA: 5954.

MR. BECKER: -- 5954, which was also part of a recall.

There are other MIS tibial components, all of which are designed to be used in connection with the NexGen system, and in particular, as we understand it, the High-Flex system.

We have a burden in this case that they are going to strenuously make us prove, that the mechanism of failure was, in fact, the Flex knee or potentially the tibial component.

We need to know, especially since a component of our case involves the MIS surgical procedure, which is used in connection with MIS tibial components and High-Flex femoral components, how those particular components interreacted.

We are not asking to go beyond MIS types of tibial trays. We are simply saying we are already going to be doing the discovery on the MIS 5950. We believe that the other components are interrelated to that.

And whether or not those cases ever get tried or heard in this MDL doesn't mean that the scope of Rule 26 discovery is so narrow that we can only talk about the 5950,

particularly if the other MIS tibial trays are intended to be used, as we understand them to be, in connection with the femoral components that are at the heart of this case.

So all we proposed was this: In connection with taking this deposition, the core of which will focus on the 5950 and the MIS surgical procedure, which nobody disagrees about, why wouldn't we also look at other MIS tibial trays that are used in connection with the femoral components to figure out, in order to prove our case, what the mechanism of failure was?

So it is not as if these parts have no interrelationship with one another. They are designed, as we understand it with our limited view of their document production, with the limited documents that we have been given to date, that the MIS tibial trays are designed to be used in connection with High-Flex femoral components and the MIS surgical procedure.

That's why we think it's relevant. That's why we think we should get the deposition.

And maybe we will come out of that deposition and say, look, Zimmer was right. This is a 5950 case.

Or maybe we will find out what we suspect to be true, which is that all MIS tibial components have a similar-type design, are intended to be used the same way, and should be part of this case.

THE COURT: Response?

MR. YEAGER: Your Honor, the Court, I think, correctly observes what the JPML -- I will start at the beginning -- what the JPML order said. I don't have this blown up, but I could write it down.

The Court describes the allegations in the cases that it was transferring as "allegations that Zimmer's High-Flex femoral components" -- defined ones we have talked about in this case -- "and/or the MIS tibial component" -- footnoted to a footnote that a name -- a name that equates to the 5950, a specific name -- "are prone to premature loosening."

So number one, the panel said this case is about a collection of cases where the Flex femoral components identified or the 5950, not the other MIS tibial components, are prone to loosening, not the additional theory that's now been discussed in this court after the JPML, that there is some systemic failure; that a femoral component, a Flex femoral component, can cause some other component to loosen. That was not in the case then. I know it's been discussed now.

Just to respond or maybe to clarify Mr. Becker's comments with regard to what MIS tibial components may mean, obviously to the JPML it meant the 5950. Every case that was before it with a tibial component was a 5950 except the

Krammes case that was just referred to.

So let me talk for a moment about the differences in those because I think this goes to the plaintiffs' argument that even though the 5950 is the one in the case, they ought to get discovery on other tibial components.

I have a small -- excuse me. If I could get my chart?

THE COURT: Sure.

(Brief pause.)

MR. YEAGER: This is the chart I think that Mr. Becker was referring to. On the left side we have the femoral components, and I have put check marks by the ones that are in the JPML order that we are not arguing about right now.

And then here are all the different tibial components that are part of NexGen.

And then here is the one, the 5950, okay?

Now, the TM tibia is next to it, called TM tibial tray. So just to talk about the similarities and differences in those two for a moment, because those are the ones that Mr. Becker was referring to, I think it's a good comparison.

As the Court can see -- and if the Court would like me to bring this up, I can -- the 5950 has a keel, a short keel, on it, and then it has these optional drop-down stems that attach.

THE COURT: Right.

MR. YEAGER: And that's the part of the dispute, I think, on that. And that sets them into the component.

The TM tibial tray -- "TM" stands for trabecular metal. It is a completely different method of affixing that tibia to the bone -- that tibial component to the bone. Trabecular metal is this really quite remarkable -- almost like a metal foam. And it allows ingrowth. It's modeled to look like bone and act like bone and have kind of mechanical qualities like bone, and it allows bone to ingrow. One does not typically use cement on that. It's a press-fit and then there is ingrowth.

And instead of having a drop-down stem, there is no drop-down stem. There are four pegs -- or I think three pegs on that tibial tray.

There are similar differences between the 5950 and the other tibias that one sees here. As the Court has observed, there is no doubt that the one that was at issue before the JPML was the 5950. The Court had not even heard about the TM tibial tray. It was not apparent from the complaint that it was some other tibial component at that point. And that's why the *Krammes* case with the TM tibia is one of the subjects of our motion for remand.

If the Court were to accept the notion that any of these other tibias that might be used with an MIS process --

not all of them are suitable for MIS processes, but several are. If the Court were to accept that notion, then we would have -- instead of the femoral components that the JPML listed and the 5950, we would have at least three more products, four of which we would have to do design files, all the other files, and all the other discovery, which very substantially would expand the scope of discovery for products that aren't even in the case, your Honor.

If they can establish a parallel -- if there is a predicate device, for example, that would be different. We have already agreed if there is a predicate device in the 510(k) approval that shows where we said something is substantially identical, of course we will produce a design file on that. We have already agreed to do that.

But to expand it wholesale in the way that's being sought here, there is no basis for it.

And the products are, as the Court can see, quite different.

THE COURT: I do want to see the chart for a moment.

(Document tendered.)

THE COURT: I need to ask -- I am holding up the chart now, and there's these purple checkmarks.

MR. YEAGER: Those are mine, your Honor. I was marking the femoral components that are part of the order.

THE COURT: As well as this one tibial component.

MR. YEAGER: That column -- it's repeated at other points in that column, but that's the --

THE COURT: Your purple checkmarks should also include these (indicating).

MR. YEAGER: Yes. I could have checked those. They are just repetitions of the same product.

THE COURT: All right. Indicating, for the record, the other MIS tibial tray photos that include the three options, I guess, for implanting.

All right. I guess one other question I have is, tell me whoever it is out there who's on the ground doing this discovery, who's actually pulling these documents and putting them together, are they maintained in such a way that there really is some discrete division on design files for each of these types of items?

MR. YEAGER: Yes. Each product has its own design file, and they each have separate design files. So we are doing at least a couple of things, and I will let my colleagues add in to the extent I don't get this exactly right.

The design files for each product, which we have long ago produced, and other files that are specific to each product.

In addition to that, as the Court has heard a lot

about, we are in the custodial file production. So in the custodial file review, we have gone to -- and we have taken the 100 custodians that have been identified by the plaintiffs and searched their files -- in addition to these other files, searched those custodians' files for files that relate to any of these products that are on the JPML list.

So we have done at least those two things. If there is something else we should comment, maybe Ms. Butler could add.

MS. BUTLER: Your Honor, I assume -- it's been my observation that in handling these cases, both when it's just a single case and in this MDL, each project -- each product has its own project history file which documents day one from the design until release.

They are going to have different design teams and separate custodians. So are we now going to have some sort of auxiliary or separate custodian list that we are also going to have to produce documents from?

So in my opinion, I think that there will be maybe a little bit of overlap, but a lot of it's not overlap.

MR. BECKER: Your Honor, may I be heard on that?

THE COURT: Yes.

MR. BECKER: Judge, I can tell you I have been spending a lot of time with the documents, and it struck me as odd when the defendants made the argument in front of the

JPML and then when they came in and made the argument here that there are these, quote/unquote, separate design teams with separate files.

And it is true that each product has its own design history file and project file. Based on what we have seen, those total somewhere between five to seven thousand pages for the entire compilation.

You will remember the 32 bullet points were supposed to produce roughly 40,000 pages for what they referred to as eight separate categories of documents.

THE COURT: Right.

MR. BECKER: So just extrapolating from there -- and I understand how dangerous that is -- we are certainly not talking about a significant number of pages.

Secondly, what I can tell you, because I am spending a lot of time on the documents, this company runs its company like all companies do; and that is, it builds off the efficiencies and the synergies of prior knowledge.

And so what you will see when we start talking about merits discovery and when we actually get there is that it's not as if they start over with every single device.

There are people who run through all of the femoral components that are on the custodial file list. There are design people who started off as engineers and get promoted to design team leaders through the course of their career.

So the notion that there are eight different design teams or five or six or ten that are completely detached from one another is simply and fundamentally false.

In fact, at one point when we were identifying our custodial lists -- and I didn't think their argument was going this way today -- we had prepared a document tracking how much overlap there was. And there is considerable overlap, which makes sense. Why would a corporation do it any other way?

THE COURT: They wouldn't. But that doesn't necessarily translate for me into a determination that I should make this discovery so broad as to include but -- not so broad, but to expand it to include all the MIS tibial components.

MR. BECKER: Let me respond to the merits of that argument. I was responding to the facts that they were raising.

One, the footnote that defendants love to quote starts with, "Zimmer's stated position is." Now, I don't have the order in front of me, but I believe that's what it says.

The second thing is that the JPML takes a position as a snapshot in time of what is before it.

Many, many, many MDLs expand to include different products that people did not originally know would be in

play. And recognizing that -- and I am going off of memory here -- the JPML specifically instructed you as the transferee court to guide us in how discovery would roll out.

THE COURT: And I intend to do that. I want to make that clear. I intend to do that.

But remember, the most significant concern the plaintiffs have had up until now is that there has been insufficient production of documents of all kinds.

MR. BECKER: Let's split the difference, then. We are not asking right now for them to produce design files or custodial files or anything like that.

We are talking about a couple of hours within a 30(b)(6) deposition that we can explore how relevant the interrelationship of these are. And if Zimmer comes back with the position and we are satisfied with it that, look, these products have nothing to do with one another, we have no need to push that.

THE COURT: I think I can resolve that issue by saying that whenever I have discovery disputes regarding depositions, I don't -- it's extremely unusual for me to -- and I wouldn't in this case -- limit the subject matters that you can cover. You can ask the witnesses any questions you want.

What I do often impose is time limits. And I think that tends to focus the mind.

So at this point I am going to sustain the objection -- the defendants' position on Subparagraph (4) and recognizing that that's without prejudice to what questions might be asked at a deposition. And I will make that clear as well, that I am expecting that when depositions are taken, there will not be subject matter objections.

MR. BECKER: Just so I am clear, because the whole paragraph relates to depositions only --

THE COURT: Oh, I thought it was production --

MR. BECKER: No, it's only depositions. It's a 30(b)(6) deposition.

THE COURT: Oh. I will still make it component, and you will produce -- the witness will be produced, and you are welcome to ask that witness any question you want.

MR. BECKER: Fair enough. Thank you, Judge.

THE COURT: All right. Okay.

MR. BECKER: The next argument relates to Paragraph IV(c), which is location of depositions.

THE COURT: You know, this one -- this is a pretty straightforward issue. I guess I am a little surprised that there would be a dispute about it.

Let me just ask this question: Am I correct in assuming that if the depositions happen in Fort Wayne, there will be, at most, one nonstop per day?

MR. BECKER: Yes.